

Financial Abuse: The Ways and Means

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Contents

Introduction	3
<i>Objectives</i>	3
<i>Disclaimer</i>	4
<i>A Word on Independent Legal Advice</i>	5
<i>Guiding Principles in BC Legislation</i>	5
Gifts	6
<i>When is it a gift?</i>	6
<i>Unauthorized “gifts” (theft)</i>	8
Loans	9
Loans with a twist: Guarantees, Reverse Mortgages, and Credit	10
<i>Guarantees</i>	10
<i>Reverse Mortgages</i>	11
<i>Credit</i>	12
Enduring Power of Attorney	13
<i>What is it?</i>	13
<i>Why are EPOAs tools for financial abuse?</i>	13
<i>BC’s Safeguards</i>	14
<i>Overview of BC’s New Laws</i>	15
Joint Ownership With Right of Survivorship	16
<i>What is joint ownership?</i>	16
<i>How are joint ownership and financial abuse connected?</i>	17
<i>The joint account challenge</i>	18

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Wills..... 19

Private Care Agreements 20

Conclusion..... 21

Appendix A: Duties and Responsibilities of an Attorney under the *Power of Attorney Act* R.S.B.C. 1996, c. 370 and the *Power of Attorney Regulation* B.C. Reg. 20/2011 22

Appendix B: Duties and Responsibilities of a Representative for Routine Financial Affairs under the *Representation Agreement Act* R.S.B.C. 1996, c. 405 and the *Representation Agreement Regulation* B.C. Reg. 199/2001..... 25

Introduction

Managing one's financial affairs is a challenge for many adults. Many of us choose to rely on others when we make financial decisions. We have a spouse or partner who looks after the family's money matters. Others turn to trusted advisors or may rely on advice from friends or professional acquaintances. In later years, some turn to their adult children believing that they are better equipped to make the necessary decisions. These are the choices we make in life. Somehow, we all get by. We may make mistakes; but we own our mistakes and we count on the fact that we have time to make up our losses when we do make bad choices. We may also have ideas about how to take action to assert our rights.

We also make decisions about how to spend our money, who to lend it to, who to trust. The decisions we must make at certain times in our lives can be difficult at the best of times. Add to the mix a lack of understanding of the legal implications of a document, reluctance to request clarification for fear of embarrassing oneself, or reluctance to challenge recommendations of a professional, and the stage has been set – the opportunity for financial abuse has revealed itself. For the majority, no wrongs will be committed. For a minority however, abuse and misuse will occur. Sometimes it will be immediate. Sometimes it happens slowly and over time. Sometimes it won't happen until well into the future.

We live in a time where older people in our communities are living longer. Compromises to their financial security impact the quality of life they can enjoy. Everyone's circumstances are unique. They may or may not have a steady income from pensions or investments; they may be fortunate enough to have retirement savings; they may own their apartment, townhouse or home; they may live near family or live alone and independently; they may be recently widowed; medical care needs may have increased leading to additional costs for care and adaptive aids and technologies.

BC's law respects our right to make our own decisions. However, it also recognizes that these decisions are not always made freely and willingly by vulnerable adults. When decisions are coerced or unduly influenced, BC has laws that allow transactions to be questioned and set aside. When a trusted decision maker (under an enduring power of attorney or representation agreement) fails to meet his or her statutory duties, BC has legislation that allows the adult and others to call the decision maker to account for their actions. Finally, if fraud or theft can be proven, criminal sanctions may be possible.

Objectives

This paper does not attempt to suggest how to resolve issues related to financial abuse. Rather, it seeks to raise awareness through a variety of scenarios about how legitimate transactions and arrangements can be used to commit financial abuse. For readers familiar with the issues, the scenarios and discussion that follows is not new. For those new to the issues of elder abuse, it is the author's hope that the discussion will help to raise your awareness of the issues involved and help you to better identify whether or not financial abuse is an issue that needs to be addressed as well as some of the underlying dynamics that may need to be understood and addressed.

Financial abuse has many faces and many forms. It does not only strike the rich. Middle and low income seniors are also vulnerable and often have more to lose.

While the financial arrangements described in this paper are legitimately implemented by the vast majority of the population, they are also the tools (or weapons) for committing financial abuse. Professionals and service providers in a range of sectors have an opportunity to assist in the prevention and detection of this abuse. Their roles and what can be done will depend on the professional or service provider.²

The starting point however, is to understand the legal arrangements – how they are intended to work, why they are used, and how they can be misused. Sometimes misuse is due to a lack of understanding of roles and responsibilities. There may be a misunderstanding about what is permitted. Other times actions may be deliberate and intentional. Sometimes circumstances change and the “abuser”, originally honest and well intentioned, may start to take advantage of his or her privileged position of trust with the older person; sometimes different value systems shape one’s sense of right and wrong; or maybe attitudes and circumstances of the parties change, bringing new stresses and issues to be dealt with. In any of these circumstances, the vulnerable older adult may not be aware of the abuse that is occurring. Or, if they are aware, they may not have the willingness, ability, or emotional or physical strength to take the steps required to stop the misuse and abuse.

Professionals and service providers assisting someone who may be experiencing financial abuse will want to be alert to situations where apparently “normal” financial arrangements may not be appropriate. They may find it necessary to dig deeper to determine the true nature and motivation behind a transaction or legal relationship. What was intended? Is that what each understood? Creative approaches may be required to rectify the situation while preserving important relationships.

Disclaimer

While this paper describes the legal arrangements and documents used to carry out financial abuse, it is not intended to provide a detailed legal analysis of the relevant elements of the applicable law. While many of the activities described as “financial abuse” may also constitute violations of the law at the civil or criminal level, many do not think of these violations from this perspective. There may be a sense that a moral wrong has occurred, but the legal remedies may be unknown or unclear. This paper will not address these remedies. Finally, the paper will not deal with frauds and scams committed by third parties against targeted populations.³

² In BC, confidential reports of financial abuse can be made to the Public Guardian and Trustee of BC. Confidential reports can also be made to a Designated Agency pursuant to Part 3 of the *Adult Guardianship Act* R.S.B.C. 1996 c. 6. Potential criminal offences may be reported to the police as well as concerns about someone’s personal safety. For more information see the Public Guardian and Trustee of BC’s publication “Protecting Adults From Abuse, Neglect and Self Neglect” and the brochure “Assessment and Investigation Services”. Both may be found at: http://www.trustee.bc.ca/reports_publications/index.html

³ For information on frauds and scams, readers are referred to the BC Centre for Elder Advocacy and Support <http://bcceas.ca/section/publications-resources/> and the Canadian Centre for Elder Law and their financial literacy materials <http://www.bcli.org/ccel/projects/>

A Word on Independent Legal Advice

A common theme through the examples provided in this paper is the need for all parties involved to understand the financial transaction or arrangement. Independent legal advice (ILA) is always desirable. However, it is easier to request it than to secure it. The 2010 Annual Report of Canada's Ombudsman for Banking Services and Investments identified five categories of complaints involving seniors' issues. The fourth category was summarized as follows:

“Complaints by family members or estates relating to the creation of joint accounts between individuals (usually a family member, friend, or caregiver) and an elderly customer, or about transactions (e.g. loan applications, guarantees, transfers of large sums of money) carried out by the elderly customer – usually in the presence of a family member, friend or caregiver – without independent legal advice”.⁴

Interestingly, the fifth category related to banks requiring independent legal advice before allowing a transaction to continue. Finding the right balance as to when and how to apply safeguards to protect vulnerable clients is a constant challenge at all levels.

The issues related to ILA were also explored in a report by the BC Law Institute and the Canadian Centre for Elder Law in 2004 in its report “Financial Arrangements Between Older Adults and Family Members: Loans and Guarantees”.⁵

The need for ILA and public education for seniors is clear. Family dynamics and other vulnerabilities only exacerbate the challenges when the transactions occur. The issues are complex. However, it is the author's view that public education has the potential to go a long way towards filling the void when ILA is not required or is refused. To the extent that professionals and service providers recognize and understand the issues, they will be in a position to better assist their client.

Guiding Principles in BC Legislation

No discussion of financial abuse and the tools used to commit it would be complete without a restatement of the principles which govern BC's legislation as it applies to the actions of substitute decision makers and those who respond to abuse, neglect and self neglect.

All of the relevant statutes include the following presumption of capability:⁶

- (1) Until the contrary is demonstrated, every adult is presumed to be capable of making decisions about the adult's personal care, health care and financial affairs.
- (2) An adult's way of communicating with others is not grounds for deciding that he or she is incapable of making decisions about anything referred to in subsection (1).

⁴ See p. 20 http://www.obsi.ca/images/document/up-1OBSI_Annual_Report_2010_HR.pdf

⁵ See discussion of responses to consultation beginning at p 23.
http://www.bcli.org/sites/default/files/Financial_Arrangements_Rep.pdf

⁶ See s. 3 of the *Adult Guardianship Act* R.S.B.C. 1996, c. 6; s. 11 of the *Power of Attorney Act* R.S.B.C. 1996, c. 370; s. 3 of the *Representation Agreement Act* R.S.B.C. 1996, c 405.

In addition, s. 2 of the *Adult Guardianship Act* sets out the guiding principles that govern the response to reports of abuse, neglect and self neglect. It states:

This Act is to be administered and interpreted in accordance with the following principles:

- (a) all adults are entitled to live in the manner they wish and to accept or refuse support, assistance or protection as long as they do not harm others and they are capable of making decisions about those matters;
- (b) all adults should receive the most effective, but the least restrictive and intrusive, form of support, assistance or protection when they are unable to care for themselves or their financial affairs;
- (c) the court should not be asked to appoint, and should not appoint, guardians unless alternatives, such as the provision of support and assistance, have been tried or carefully considered.

These principles, coupled with the duties of an attorney found in s. 19 of the *Power of Attorney Act*, (see Appendix A) and the duties of a representative found in s. 16 of the *Representation Agreement Act* (see Appendix B), establish that an adult's right to make decisions and be heard at all times is paramount. Although much of the law has been in place since 2000, societal attitudes and behaviours do not always reflect this perspective. In addition, well-meaning people can still disagree on when it is appropriate to override an adult's stated wishes. Professionals and service providers may wish to ensure these rules are kept front and centre during any discussion or response. The words seem simple. Implementing them can be challenging.

Gifts

When is it a gift?

Parents and grandparents (donors) make gifts to their children and grandchildren (donees) all the time – for birthdays, getting started in life, helping out with an education. Voluntary gifts are normal. They may be regular annual small gifts. They may be one time gifts of more substantial amounts. Sometimes an equal amount is given to each donee as a one-time gift at a point in time such as a graduation or other special event in life. Gifts may even be made against the donor's better judgment, but it is still the donor's decision. They want to do it. They have a choice. They may want to encourage someone in an endeavour. They may feel they need to "be fair". Family dynamics are complicated.

However, gifts that are not voluntary (e.g. gifts where there has been coercion, undue influence or threats) are another matter. Older adults have a right to assert their preferences and to protect their own financial interests. They may need to know how to do this. They may also need emotional support to stand their ground.

Consider the stories of Elisabeth and Remy.

What would you say to each of them if you had the chance?

Elisabeth's story:

Elisabeth (75) is living with her oldest daughter Janice and her family (husband Roy and two teen age boys). She moved in after a serious fall. Her apartment has been sold. She helps with the housework and some cooking when she is able. She contributes to paying for groceries. The boys are active on sports teams. Janice and Roy have good jobs but find the costs of the team activities to be a strain on the family budget. Janice asks Elisabeth if she could help out. Elisabeth hesitates. She worries about her increasing medical expenses and still has things she wants to do, including visiting her 2nd daughter Rea in Europe. Roy suddenly says "What are you worried about? You have lots of money now that the apartment is sold and you are living here. Besides, we're paying for your living costs now. The least you could do is to help us help the boys with their team travel costs. Consider it a special gift to them now that you live with us."

The trips can easily cost \$500 each and there are at least four coming up. Elisabeth feels that the boys should be working to help pay for some of these costs. She is not comfortable giving up \$2000 so quickly. She receives OAS and CPP, but her financial security comes from the \$200,000 she has from the sale of her apartment. However, she relents, feeling she has no choice.

A few months later, tensions around the house are high. Janice comes to talk to Elisabeth. She tells her that she and Roy have been talking and the house is too small for all of them. They want to use the money from the sale of her apartment to build an addition to the house, or to sell the house and buy a larger one. Janice suggests that since she is going to inherit at least half of Elisabeth's estate and Elisabeth is going to live with them, why not make a gift of the money now when it can be used for the benefit of everyone, including Elisabeth.

Elisabeth realizes that if she agrees to this she may no longer have much money of her own. But, she also realizes that if she doesn't live with Janice, she will have to move to a retirement facility. Still, she isn't comfortable giving up everything she has and becoming so dependent on Janice and Roy. She and her husband worked hard to see their children get a good start in life and to ensure they would have some financial security in their later years. She also wants to still be able to leave something in her will to Rea who moved to Europe a decade ago and with whom she still had a good relationship.

Remy's story:

Remy's nephew Sid has always been close to Remy, especially after Sid's father died. When growing up, they played sports and did a lot of outdoor activities together. Remy has always been a bachelor. Sid visited him regularly in his teenage years and during his early twenties. Recently however, the visits have become irregular and Sid seems agitated. He talks to Remy about various difficulties he is having. He doesn't want to tell his mother and step-father.

Remy doesn't want to betray Sid's trust and he is worried that without some financial help Sid will get into trouble. So, the first time he said: "Why don't I give you an early birthday gift. Here is \$200." Each visit there is a new story and Remy offers another "advance gift". Sid's visits begin to fall farther and farther apart. He has started calling instead, saying he needs money. The amounts needed are also increasing.

Remy cannot afford to keep giving Sid the money and he worries about how Sid might be using it. There had never been any tangible evidence of where the money was going. Remy doesn't know how to deal with this. One day Sid called. Remy suggested that he couldn't afford to keep up these payments. Before he could say more Sid yelled "I thought you loved me like a son. If you won't help me I'm not coming to visit any more. So what's it going to be?"

Unauthorized "gifts" (theft)

Another area that can cause problems for seniors is giving bank debit cards to a child, grandchild or trusted person (a "helper") to purchase groceries or other necessities. In the past, a senior might have given the helper \$50 and expected change back. If change was not offered, the senior would have to decide whether or not to say anything. Debit cards seem so much easier for everyone.

However, once the card is in the hands of another, with the PIN, the helper has full access to the bank account. When purchases are made, other items might be purchased that are not for the adult. Withdrawals of additional cash may go unnoticed if the adult is not receiving or monitoring bank statements.

Consider Amy's story.

Amy's story:

Amy's granddaughter Iris visited regularly. After Amy had hip surgery, Iris offered to help by running Amy's grocery errands while Amy recovered. A couple of months later, Amy's rent cheque bounced. With the landlord's assistance, Amy discovered that her bank account had been wiped out. When she looked at her online statements there were numerous ATB withdrawals. The revelation that a trusted grandchild had abused Amy's trust, and in fact has stolen from her, was shattering.

Legally, Iris had committed theft. But how will it be proved? As far as the bank is concerned, Amy shared her PIN number, a clear breach of the cardholder agreement. There is no recourse against the bank. Luckily in this instance, Iris's mother was able to help recover the money from Iris.

Loans

When one person provides money to another who promises to repay the funds, a loan arrangement is established. Failure to document the loan does not convert it to a gift.⁷

Commercial loans include an interest rate; they may provide for collateral as security for the debt; they may be payable on demand; or they may be repayable on a fixed schedule. However, when a loan is between family, relatives and other trusted friends, family and other social dynamics are not conducive to such detailed documentation. Prudent practices that might ensure a loan is appropriate, necessary, or even a good “business idea” for the lender, are overlooked or ignored.⁸ Requiring legal documentation may suggest the lender does not trust the borrower. At a practical level, documentation adds cost and time. It may also draw attention to a transaction that the parties want to keep private. As a result, many of these loans remain undocumented.

When an older person is asked for a loan, it may well be because it is more comfortable for all concerned. It isn't a request for an outright payment or gift. It is a loan. Implied, if not stated, is a promise to repay the amount borrowed. It is a fairer financial exchange and certainly has the appearance of being less greedy or opportunistic. The borrower may even have an honest intention to repay the loan, however ill-planned or unrealistic such an intention may be.

As noted, these loans are often not well documented, if documented at all. Once upon a time, there might have been a cheque with “loan” written on the “memo” line. Today, with electronic banking, the likelihood of a paper trail to prove the transaction ever occurred is even more remote. The lender may want to allow flexibility so as to minimize any hardship. They may not want to ask the hard question: “when will you repay this?” The result is vague and unclear expectations with a high probability that expectations are not aligned.

Pressure to lend money, or assist with the purchase of an asset, may well constitute intentional financial abuse. Even if the loan was first created in the spirit of goodwill and some payments were made, if payments stop, the older adult/lender is left in a difficult situation. The borrower who is not making payments is likely relying on the family relationship or friendship to avoid becoming accountable for repayment. The adult has two choices: ignore the situation or take it on. Most choose the former.

Consider Remy's story as it continues to unfold.

⁷ See BC Law Institute report supra note 5 at page 6 and footnote 12 citing *Kooner v. Kooner* (1979), 100 D.L.R. (3d) 76 (B.C.S.C.); *Wispianska v. Kuzniar (Jopowicz)* (1978), 3 R.F.L. (2d) 6 (B.C.S.C.); *Campbell v. McLelland*, [1995] B.C.J. No. 1893 (S.C.).

⁸ See BC Law Institute report supra note 5 at pages 23-25 and Appendix B beginning at page 37 for a summary of responses to a questionnaire regarding ILA for loans or guarantees. The most common amount involved when lawyers were consulted about loans and guarantees was \$100,000. The second most common amount was \$10,000. Amounts involved ranged from \$8000 to \$600,000. 41 of 123 respondents reported that in spite of advising a client to not proceed, the client proceeded.

Returning to Remy's story ...

Sid makes an apology for his outburst on the phone. He says to Remy: "All these advance birthday gifts are too generous. I don't like it either. Why don't we make this a loan? Then I won't feel so bad about taking the money and you know you can demand it back at any time. I'll make payments as I can."

Remy thinks this is a good idea and they agree to write up a simple demand loan for \$5,000. Remy has already paid Sid \$2000 so he gives him another \$3000. Their visits continue until the summer when Sid announces he is moving to Vancouver to go to film school. He tells Remy he has found a cheap place to live in East Van, but will need a car to get to school. He says that if Remy can help him buy a reliable car, he'll come home every month for a visit and they can use those visits to run special errands. The car he wants is a used sports car and will cost \$20,000. He suggests the amount be added to the loan agreement.

Sid acknowledges that while he goes to school he won't be able to repay the loan, but when he graduates, he promises to pay it all back. Everyone is talking about how good the job prospects are for the graduates of this program. Remy is torn. He wants Sid to succeed and is glad to see he has some direction. Reluctantly he agrees.

Loans with a twist: Guarantees, Reverse Mortgages, and Credit

Guarantees

When a borrower has no security, financial institutions will often ask for a guarantor, someone who promises to pay the debt if the borrower defaults on his or her obligations. If a grandparent or parent refuses a request to be a guarantor, it may well be interpreted as a lack of confidence in the grandchild or child's ability to succeed and/or repay the loan. Once again, family dynamics make it difficult for some to say no.

Loans that require a guarantee are often for larger sums and are from commercial lenders who ensure that their interests are protected. When someone guarantees a loan will sign complicated, commercial documents. It is crucial for the guarantor to have a realistic perspective on whether or not the borrower truly can afford this debt and to understand the consequences to the guarantor if the borrower defaults. Consider Bill and Jan's experience.

Bill and Jan's story:

Suzanne is 50 and has just ended a second long term relationship. She has a history of drug and gambling addictions. She has a job, but it is commissioned base and requires travel around the lower mainland. Once again, she has come to her parents (Bill and Jan) asking for help. She knows they won't give her any more money and she figures they'll refuse a loan. So, instead she has found a credit union that will lend her money to buy a new car for \$25,000. But she needs a guarantor.

Bill and Jan initially refuse. Suzanne says: "How am I supposed to earn an income without a car. You won't give me one even though I have a job. I can afford the payments. The Credit Union just needs a guarantor. It is a formality. You don't trust

me. After all the running around I do for you. I need this car for the job. If I don't have a decent car I won't be able to help out anymore either. Is that what you want?"

Bill and Jan relent. The credit union required independent legal advice but Suzanne complains about the additional costs. Bill and Jan agree to waive their right to ILA and the loan goes ahead.

Suzanne's job does not last and 12 months later she defaults on her loan. Bill and Jan have to start making payments. Suzanne refuses to sell the car saying the depreciation is too high and they won't get enough money to cover the loan.

Reverse Mortgages

Another way to access money is a loan secured with a "reverse mortgage". The CHIP Home Income Plan advertises itself as "Canada's Only Provider of Reverse Mortgages". Home owners can "pay off their debts", "help their families", "fix up their homes", or "invest for additional income". "Turn your home into Tax-Free Cash".⁹

Generally, a reverse mortgage is a way for homeowners over age 55 to access the value of their home. A loan is secured against the home, but payments are not required. When the owner dies, sells or moves, the loan amount plus accrued interest must be repaid. There are options for paying down interest and repaying the loan at any time. While there are some advantages for seniors who wish to use the CHIP program, it is critical that they fully understand how it works and what will happen under different scenarios, especially if two people live in the home. Independent legal advice is required to obtain a CHIP loan.¹⁰ For purposes of this paper, the concern however, is the underlying motive for entering such a legal arrangement. Consider Raoul's story:

Raoul's story:

Raoul is a widower living on a fixed income in a small home. His son Dev and daughter Lara live nearby with their families. Both have young children. Raoul is devoted to the grandchildren and enjoys looking after them after school. He often visits on the weekend and attends their team sports.

Lara's husband Aran is in financial difficulty and is unable to obtain a commercial loan. Lara asks Raoul for a \$25,000 low interest loan. Raoul hesitates. Lara senses his hesitation and says: "Think about it overnight dad. But, you know Aran has never reneged on a debt to family. We'll pay it back. And I have to warn you. This is our last chance for Aran to get his business back on a stable footing. He says that if it fails, we're moving and you'll be lucky to see any of us again. He suggested that if you don't have the cash flow for it and don't want

⁹ See website: <https://www.chipmoney.ca/>

¹⁰ For more information on the CHIP program see <http://www.chip.ca/index.cfm?id=103>. For information on Reverse Mortgages generally see the BC Law Institute 2006 Report no. 41 Report on Reverse Mortgages http://www.bcli.org/sites/default/files/Reverse_Mortgages_Rep.pdf

to borrow from the bank with a secured line of credit, maybe you could take out a reverse mortgage on your house. They don't collect on those until you die."

Raoul doesn't like the idea but convinces himself it is only \$25,000 and the house is worth \$400,000. He agrees to a reverse mortgage because he does not want to risk losing his daughter and grandchildren.

Credit

Sometimes bank guarantees and reverse mortgages seem too complicated when a cash advance on a credit card is feasible. Or, maybe the senior has a line of credit already in place (secured or otherwise) for emergency needs or major expenses. All the credit approvals are in place. There are no questions and no forms.

Credit cards and lines of credit provide another easy source of ready cash. The adult may have to agree, but if it is already in place and the "abuser" has an enduring power of attorney, the adult may never even know. Consider Elsie's story.

Elsie's story:

Elsie's son Don has been in and out of Elsie's life since he turned 19. Don is now 40. Last year he returned to Vancouver. Elsie agreed that he could live in the basement suite until he got his feet on the ground again.

Elsie had a number of issues with Don as soon as he moved in. Early on Don told Elsie he owed a friend \$10,000. The friend was making life difficult. He told her that things would be so much easier if he could just pay off the debt. Elsie said she didn't have that kind of money, but Don noted the limit on her Visa card was \$20,000. Don convinced Elsie to take a cash advance, promising her to repay the money within the year. Elsie transferred the funds online to Don. No notes were made in the transaction description field. The transfer was not documented as a loan or in any other way.

The interest rate for cash advances on the credit card is 20% and it runs from the day of the advance. Elsie will be responsible for the monthly interest (\$2000 annually) until the full amount is repaid.

A similar result would have occurred if Elsie had an unsecured line of credit although the rate may be less. The rate on a secured line of credit would be even less, but still, Elsie bears the cost unless Don repays her the principal and all interest incurred while the credit is outstanding.

Enduring Power of Attorney

What is it?

A power of attorney (a “POA”) is created by a donor (the “adult”) authorizing another trusted person or authorized entity such as a trust company or the Public Guardian and Trustee (the “attorney”) to make financial and legal decisions when the adult is unable or unavailable to make the decision him/herself. POAs are easy to make. They are used in business. They are used when someone is leaving town and needs someone to carry out certain financial transactions during the adult’s absence. Banks have standard forms so clients can authorize someone to have authority over an account at that bank.

An attorney acting under a POA is accountable to the donor and may only make decisions that are authorized and that are for the donor’s benefit. The attorney cannot use the donor’s money for other purposes or for the attorney’s benefit.

POAs terminate on the adult’s death or when the adult revokes it. A POA also terminates on the adult’s incapability. Since 1978 however, BC law has permitted adults to make an enduring power of attorney (an “EPOA”). An EPOA states that the attorney’s authority continues in the event of the that the adult becomes mentally incapable. In BC, until September 1, 2011, two simple sentences were all that was required to give an attorney full control over an adult’s financial and legal affairs after the adult loses the ability to supervise the attorney!

Why are EPOAs tools for financial abuse?

EPOAs are part of many estate plans. They are a tool to ensure that someone is able to help an adult when the adult is not able to manage financial affairs on their own. For most people, they are an efficient, cost effective and private way to ensure management of one’s financial affairs. Once again, the 80/20 rule applies. Most attorneys carry out their duties honestly and responsibly. However, for years EPOAs have also been a tool (or a weapon) for committing financial abuse. Attorneys transfer money to others with little to no scrutiny. Funds are used to pay for the attorney’s personal expenses. Assets may be purchased for the attorney’s use, including cars, boats and vacation properties. There are even stories about parents going south for the winter and the attorney going to the bank to borrow money and attempting to use the EPOA to secure the loan with a mortgage against the parent’s home without the parents’ knowledge.

When an attorney begins to act under the authority of an EPOA, third parties tend to take instructions from the attorney, even if the adult is still capable. They may not take the time to check with the adult to ensure that the adult wants the transaction to occur. Some banks will ask to talk to the adult before starting to take instructions in order to ensure that the adult, their client, knows and wants the attorney to start to act. Alternatively, the bank may require evidence that the adult is not able to communicate with them.

Attorneys often redirect mail so they can stay on top of the accounts. The result however is that the Adult has no information about their account balances and asset values unless the attorney chooses to share it with them.

Attorneys may also sell assets, including homes, without consulting the adult. They may even attempt to use the EPOA to make the adult's accounts joint with right of survivorship or to transfer real estate assets into joint ownership (see below), with or without the adult's knowledge or consent.¹¹

As noted at the beginning of this paper, many arrangements are valid and the parties are honest. However, too many seniors have lost most of what they own because of the actions of an attorney. Often the money is gone and cannot be recovered. While the attorney's actions may amount to criminal theft, many adults are reluctant to press charges against family members and trusted friends or caregivers. They are embarrassed that they are in the situation. They may also need the attorney to assist with daily living and/or companionship. Anyone who works with vulnerable adults has a story to tell.

BC's Safeguards

In 1989, BC began a process to review its guardianship laws, including the *POAA*. It has long been known that safeguards were needed to prevent the abuse and misuse of EPOAs. However, a legislative response requires a balancing act. For the majority who use the document honestly and appropriately, too many safeguards can make things onerous. However, changes were required to deal with the minority who abuse and misuse the EPOA, whether deliberately or because of a lack of understanding of the true nature of the document and the attorney's responsibilities.

On September 1, 2011 the law governing EPOAs was substantially changed. It now sets out rules about how an EPOA is made including rules about who can be a witness, who can act as an attorney and what an attorney can do. Prior to September 1, 2011, much of the law that applied was derived from the common law. Part 2 of the amended *Power of Attorney Act* R.S.B.C. 1996, c. 370 codifies much of the common law by setting out the attorney's duties, responsibilities and rights. Similar rules apply when a representative has been appointed under a representation agreement (RA) for routine financial affairs prepared in accordance with s. 7 of the *Representation Agreement Act* R.S.B.C. 1996, c.405 which came into force in 2000.¹²

Despite these changes to BC's law, challenges in the years to come are inevitable for lawyers, mediators and others. The nuances of the differences between the common law and the new BC law are beyond the scope of this paper. However, attitudes and actions of attorneys, and regrettably, even the advice from some advisors, did not change overnight on September 1st, 2011. BC has a major educational challenge not only with the general public, but also with the third parties who will be asked to acknowledge and accept EPOAs and RAs for routine financial affairs, and to a lesser extent, professional advisors as they become more familiar with the rules and how they work.

¹¹ See duties of an Attorney in Appendix A. S. 19 of the *Power of Attorney Act* now prohibits such activity in BC without the Adult's consent.

¹² For more information on enduring powers of attorney and representation agreements, see the Public Guardian and Trustee of BC's publication "It's Your Choice: Personal Planning Tools" at http://www.trustee.bc.ca/services/adult/personal_planning_tools.html Note: the *Representation Agreement Act* was amended September 1, 2011 to, among other things, streamline the execution and witness requirements.

Overview of BC's New Laws

What follows is a brief summary of some of the key provisions of the new *Power of Attorney Act* R.S.B.C. 1996, c. 370 (the "POAA") which set out an attorney's duties and responsibilities. See Appendix A for the complete set of statutory and regulatory provisions that apply to attorneys acting under an enduring power of attorney. For completeness, Appendix B sets out the provisions governing representatives acting under a Representation Agreement for routine financial affairs.

While the rules that apply to each type of decision maker are sometimes expressed slightly differently, and/or there may be some distinctions, subject to any instructions in the document, attorneys and representatives (decision makers) are bound by a similar set of responsibilities and duties. Generally, they must:

- not act outside the scope of their authority. This requires being aware of relevant statutory rules and any limits in the document appointing the decision maker;
- act in the adult's best interests; follow pre-expressed wishes if known; and if there are no known wishes, follow the adult's known beliefs and value;
- involve the adult in decision making where possible;
- give priority to the adult's personal care and health care needs;
- invest in accordance with the *Trustee Act* R.S.B.C. 1996, c. 464;
- keep the adult's property separate from the attorney/representative's property (e.g. cannot make assets joint with right of survivorship);
- not make gifts, donations or loans except in accordance with the guidelines set in the legislation (see Appendix A and Appendix B);
- not make gifts or loans to him or herself, or pay him or herself unless authorized;
- not make a will or a new beneficiary designation; but see rules for renewing and replacing registered plans already in existence;
- keep records of decisions and transactions.

It is also worth noting that the BC legislation defines "financial affairs" and "personal care". (See Appendix A and Appendix B). Decisions as to where someone lives (shelter), dress and social activities fall under "personal care". While the attorney or representative has authority for paying for the related costs, where the availability of funds is not in issue, the attorney or representative for routine financial affairs does not have authority to make these decisions. Similarly, they do not have authority over health care decisions, a common misunderstanding in the general population. Personal and health care decisions must be made by representatives named in a representation agreement.¹³

Consider Gerald's story. Are Jeff's proposals appropriate? Why not? What is he doing? What should Paul's response be?

¹³ For more information on representation agreements for personal and health care decisions, see supra note 12.

Gerald's story:

Gerald recently had to move to a care facility. His children did not have the skills or time to give him the extra care he needed to live in his home. His oldest daughter Megan had an enduring power of attorney, and with Gerald's permission, the family home was sold and Megan deposited the funds into Gerald's investment account.

Shortly after the sale, Megan's sister Jane called and after a short discussion about how Gerald was adapting, Jane said: "Now that dad is in the facility, they will be looking after him and he doesn't have any expenses. I know his will leaves everything to the 4 of us siblings, but why don't you transfer half of the proceeds from the sale to each of us now? Put the rest of it in bonds and then if we need anything more it will be easy to access the money. My job is being cut back to half time and I have a lot of family expenses. I need the money now, not when he dies."

Prior to September 1, 2011, Jane's proposals would have been improper and not permitted. Jane is suggesting an "advance" on her inheritance. Some call it a "pre-distribution" or "early estate planning". More importantly, the *POAA* now prohibits the suggested actions. There is no evidence that transferring Gerald's assets to his sons would be in Gerald's best interests. His accommodation, care and medical costs are unknown at this time. In addition, Megan cannot make a gift to herself unless it is authorized in the document.

Although Gerald could consent to these transactions if still capable, one might be concerned as to whether or not coercion or undue influence was used to pressure him to agree.

With respect to investing the funds, Megan is also bound to the prudent investor rule as set out in the *Trustee Act* R.S.B.C. 1996, c. 464. Bonds might be appropriate in the circumstances, but not for the reasons suggested by Megan.

Joint Ownership With Right of Survivorship

What is joint ownership?

Jointly owned accounts and assets with right of survivorship are an ongoing challenge when it comes to financial abuse. Although joint ownership can be an efficient and effective estate planning arrangement, joint ownership with right of survivorship is not well understood.¹⁴ Joint ownership is also easy to put in place. Account documents at a financial institution just need to be changed. A change in ownership is filed at the Land Title Office.

Older adults often rely on the advice of others and often will agree to joint ownership without fully understanding the legal implications during their lifetime or on death. Regrettably, joint accounts in

¹⁴ There is a second kind of joint ownership known as tenants in common. If the owners own property as tenants in common, each owner has a specified share of the ownership. (e.g. 30%, 50%, 70% etc). On death, the owner's interest falls into the owner's estate and passes according to the deceased person's will.

particular are too often recommended by advisors and well-meaning friends and acquaintances as a means to simplify estate administration, avoid probate fees and/or make it easier to look after a senior's financial affairs (a substitute for an EPOA). While the recommendations may be appropriate for estate planning, important consequences follow and are not often well enough explained or understood. A common misunderstanding is that a joint account is required to manage expenses. A POA or EPOA is sufficient for this purpose.

The legal consequences of joint accounts with right of survivorship include:

- On the death of one, the survivor takes legal title. Probate is not required. The asset does not form part of the estate. No probate fees are required. Depending on the circumstances however, the law in Canada may require the survivor to return the assets to the estate.¹⁵
- As equal owners during the lifetime of the joint owners, both owners have legal right to use the asset or funds in the account. Financial institutions account agreements usually allow either owner to withdraw funds.
- For tax purposes, both owners share the income.
- Joint assets may also be available to meet legal obligations to the creditors of either owner, including former spouses on a marriage breakdown.

How are joint ownership and financial abuse connected?

Issues arise when one person owns an asset or an account and that person makes a gratuitous transfer of the asset or account by registering it as joint with right of survivorship with another person. On its face, the transfer might be considered a gift of one half of the asset, giving immediate rights of ownership and enjoyment, along with the right of survivorship on death. However, the law has a number of rules which put such transactions in question unless the true intention can be established.

The common law presumption of advancement says that if a spouse makes a gratuitous transfer of an asset from his or her name into the names of both spouses, there is a presumption of a gift.

Accordingly, a true joint tenancy exists unless the presumption is rebutted. Similar rules apply if the transfer is from a parent to the parent and a minor child. However, in 2007 the Supreme Court of Canada ruled that a gratuitous transfer from a parent to the parent and an adult child is not subject to the presumption of advancement.¹⁶ Rather, on the parent's death, there is a presumption that the adult child holds legal title on a resulting trust for the parent's estate. The adult child must provide evidence to rebut the presumption and prove that a gift was intended. Similar rules have always applied if the asset or account was put into the name of the adult owner and any other adult person where there is no consideration or contribution to the value of the asset or account.

Financial planners and estate planners often recommend that assets be owned joint with right of survivorship to avoid the cost and delay of probate. The consequences of this advice, if not carefully reviewed, may not be what the senior had planned for the distribution of his or her estate. Even if the joint owner promises to "distribute the estate as it would have been under the will", enforcement is

¹⁵ Pecore v. Pecore, [2007] 1 S.C.R. 795, 2007 SCC <http://scc.lexum.org/en/2007/2007scc17/2007scc17.pdf>

¹⁶ Pecore v Pecore (Supra)

difficult. Inevitably, if there are other siblings or beneficiaries under the deceased's will, litigation may well occur since the true ownership of the asset on death will depend on the facts.

The joint account challenge

The shared ownership of joint accounts and joint assets causes a number of issues when authorities are investigating financial abuse. For example, banks are often reluctant to provide information to investigators, and/or they may refuse to release assets to legally appointed decision makers without the consent of the joint owner. Proof of true legal and beneficial ownership and the intent of the parties are often difficult to establish even though there may be a clear trail showing that the source of funds in an account or the source of funds used to purchase a property.

Although BC's *POAA* prohibits mixing the adult's assets with the assets of the owner, there is no rule that stops the adult from still agreeing to a transfer whether or not there is an EPOA in place. As long as there is no evidence that the adult is incapable of understanding the transaction, he or she can consent to a transfer. Advisors, or anyone providing independent legal advice in such a case however, need to be alert to the risk of coercion, undue influence or other circumstances that suggest the adult may not truly wish for the transaction to occur and/or does not understand the full legal implications of the decision.

Consider Greta's story.

Greta's Story

Greta was widowed 5 years ago. She has five children and her current will leaves everything to the children equally. Her assets are comprised of the house, a RRIF, and a small investment account. She receives federal government CPP and OAS pensions.

The youngest child (Dina) has moved back home. She lost her job, and Greta needs help around the house as she has limited mobility. She also needs help with managing day to day finances. Greta makes an EPOA appointing Dina as the Attorney. Dina convinces her mother to make the bank and investment accounts joint, arguing that it will be easier for her to give instructions at the bank if she is a co-owner. She also convinces Greta to reregister the house as joint tenants so that when Greta dies, there won't be any probate fees. Greta isn't sure about any of this, but doesn't know who to talk to since everyone at the bank has changed and she can't get out alone. She agrees and signs the papers Dina brings home.

Dina later decides she is going to start her own business. She needs a bank loan of \$20,000 to get started but interest rates are high. The lender notices she is a joint owner of the house and suggests she take out a secured line of credit, using the house as collateral. The lender does not ask to speak to Greta. He also suggested that since there is a cost to putting a secured line of credit in place, Dina might want to maximize the amount of the loan and mortgage available. That way, she can avoid future costs if she ever needs to increase the loan. Because Dina has the EPOA, Dina can sign the mortgage documents for herself and her mother. But she decides to just tell her mother to sign the documents. Greta was tired that day and didn't take time to read the documents.

Greta's older son Rik comes home for a visit the following year. Greta complains that Dina says there is no money. She never shows Greta the bank or investment account statements. Rik confronts Dina who says: "Where were you when mom needed help? I'm doing the best I can. It costs to look after this place you know. And mom has special needs now. Besides, I can't work because I'm looking after her, so she owes me something for my time." Dina refuses to give Rik any information.

Rik reports the conversation to Greta. While Greta's mobility is limited and she tires easily, she is mentally capable. She asks Rik to take her to the bank. Greta is horrified to learn that there is a \$200,000 line of credit registered against her home with a current balance of \$180,000, her RRIF has been collapsed and the investment account only has one \$20,000 GIC left in it.

Greta should have had an opportunity to obtain independent legal advice about the line of credit and the mortgage. Greta could revoke her EPOA and make a new one appointing Rik. However, recovery of the assets will be difficult unless Dina used the funds to acquire assets that can be transferred back to Greta. Criminal charges may be a possibility, but this would require Greta's cooperation to make a complaint, and to act as a witness. The joint ownership has complicated the situation. Determining Greta's true intention given that she signed all the joint ownership documents may be difficult. At a minimum, Greta will need to deal with the embarrassment of admitting she signed documents she did not understand.

Wills

Another "tool" for financial abuse is the will. Many seniors consider changing their wills to provide for someone who has provided care and support in later years. However, if a caregiver (whether a child, close relative, or unrelated person) puts pressure or coerces a senior to change their will the changes may not be valid. When competing interests are vying for a senior's assets, numerous changes to a will can occur. A senior has a right to change their will. They may even change it reluctantly. The issue is "why is it being changed"? Is it one action that is a red flag that other financial and/or elder abuse is occurring? Or is it a question of undue influence or coercion?

Lawyers and notaries who have known a client for a long time and have prepared previous wills may be more alert to the situation and will question the reason for the changes. Those who do not know the client will need to take caution when preparing a will that appears to favour the person who accompanies the client to the office, makes the appointment, or phones in the instructions.

Readers are referred to the BC Law Institute Report "Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide"¹⁷. The report provides a thorough review of the law relating to undue influence as it applies to inter vivos and testamentary gifts as well as the anticipated changes to the law in BC under the *Wills, Estates and Succession Act*¹⁸. It provides a listing of red flags

¹⁷ BC Law Institute Report no. 61 issued October 2011.

http://www.bcli.org/sites/default/files/undue%20influence_guide_final_cip.pdf

¹⁸ Bill 4 2009 received Royal Assent October 29, 2009. S. 52 says: [continued on next page]

that may indicate the presence of undue influence and a series of recommended practices to help screen for it. A reference aid is attached as an appendix to the report and summarizes the key information with a checklist of the recommended practices and the red flags as well as a flow chart setting out the steps of the Recommended Practices.

Private Care Agreements

In 2002 the BC Law Institute published report No. 18: “Private Care Agreements Between Older Adults and Friends or Family Members”.¹⁹ Private care agreements are generally characterized by a transfer of property (often a home) to a friend or family member in return for a promise of care and support in the future.²⁰

The BCLI report is careful to note that private care agreements are not inherently a tool for committing financial abuse.²¹ It provides a comprehensive review of these agreements and has been noted in this paper in order to draw the reader’s attention to the need to fully understand how they work and the issues and concerns for both the adult and the caregiver. What may seem like a practical solution to an older person’s need for care and the caregiver’s need for compensation for the future care to be provided, can be complicated to put in place. The report is recommended to anyone who is contemplating such an agreement as a solution to a practical problem, and to raise awareness that they can also be used to commit financial abuse (or fraud or theft), when for example, there may be no intention to actually provide the promised care.

Undue influence

52 In an action, if a person claims that a will or any provision of it resulted from another person

(a) being in a position where the potential for dependence or domination of the will-maker was present, and

(b) using that position to unduly influence the will-maker to make the will or the provision of it that is challenged,

and establishes that the other person was in a position where the potential for dependence or domination of the will-maker was present, the party seeking to defend the will or the provision of it that is challenged or to uphold the gift has the onus of establishing that the person in the position where the potential for dependence or domination of the will-maker was present did not exercise undue influence over the will-maker with respect to the will or the provision of it that is challenged.

For the full text of *Wills, Estates and Succession Act* S.B.C. c 13 see

http://www.leg.bc.ca/39th1st/3rd_read/gov04-3.htm .

See also Bill 10 2011 *Wills, Estates and Succession Act Amendment Act* S.B.C c.6 which received Royal Assent June 2, 2011. http://www.leg.bc.ca/39th3rd/3rd_read/gov10-3.htm

¹⁹ The report can be found here:

http://www.bcli.org/sites/default/files/Private_Care_Agreements_Between_Older_Adults_and_Friends_or_Family_Members.pdf

²⁰ Supra note 17 at page 6.

²¹ Supra note 17 at p 9.

Conclusion

The objective of this paper was to identify the ways and means that financial abuse is carried out. The scenarios were offered to give some insight into the family and interpersonal dynamics that complicate each and every situation. While some situations may be easy to resolve, others are not.

It is the author's hope that while no answers were provided, the information will assist professionals, service providers and other caring friends and neighbours to better understand the facts and dynamics that may present themselves and offer some clues as to where the underlying issues may be found.

Appendix A:

Duties and Responsibilities of an Attorney under the *Power of Attorney Act R.S.B.C. 1996, c. 370* and the *Power of Attorney Regulation B.C. Reg. 20/2011*

Definitions

"**financial affairs**" includes an adult's business and property, and the conduct of the adult's legal affairs;

"**health care**" has the same meaning as in the *Health Care (Consent) and Care Facility (Admission) Act*;

"**personal care**" includes the following matters in respect of an adult:

- (a) diet, dress and hygiene;
- (b) health related activities, including medication;
- (c) social, recreational, employment and educational activities;
- (d) shelter, including admission to a care facility under the *Health Care (Consent) and Care Facility (Admission) Act*;

"**spouse**" means a person who

- (a) is married to another person and is not living separate and apart, within the meaning of the *Divorce Act* (Canada), from the other person, or
- (b) is living with another person in a marriage-like relationship, including a marriage-like relationship between persons of the same gender.

What enduring power of attorney may do

- 13** (1) An adult may, in an enduring power of attorney, authorize an attorney to
- (a) make decisions on behalf of the adult, or
 - (b) do anything that the adult may lawfully do by an agent in relation to the adult's **financial affairs**.
- (2) An adult may grant general or specific powers to an attorney.

Duties of attorney

- 19** (1) An attorney must
- (a) act honestly and in good faith,
 - (b) exercise the care, diligence and skill of a reasonably prudent person,
 - (c) act within the authority given in the enduring power of attorney and under any enactment, and
 - (d) keep prescribed records and produce the prescribed records for inspection and copying at the request of the adult.

(Regulation) Records of Attorneys

- (1) An attorney acting under an enduring power of attorney must make a reasonable effort to determine the adult's property and liabilities as of the date on which the attorney first exercises authority on the adult's behalf, and maintain a list of that property and those liabilities.
- (2) An attorney acting under an enduring power of attorney must keep the following records in relation to the period for which the attorney is acting:
- a) a current list of the adult's property and liabilities, including an estimate of their value if it is reasonable to do so;

- | |
|---|
| <ul style="list-style-type: none">b) accounts and other records respecting the exercise of the attorney's authority under the enduring power of attorney;c) all invoices, bank statements and other records necessary to create full accounts respecting the receipt or disbursement, on behalf of the adult, of capital or income |
|---|

(2) When managing and making decisions about the adult's financial affairs, an attorney must act in the adult's best interests, taking into account the adult's current wishes, known beliefs and values, and any directions to the attorney set out in the enduring power of attorney.

(3) An attorney must do all of the following:

- (a) to the extent reasonable, give priority when managing the adult's financial affairs to meeting the personal care and health care needs of the adult;
- (b) unless the enduring power of attorney states otherwise, invest the adult's property only in accordance with the *Trustee Act*;
- (c) to the extent reasonable, foster the independence of the adult and encourage the adult's involvement in any decision-making that affects the adult;
- (d) not dispose of property that the attorney knows is subject to a specific testamentary gift in the adult's will, except if the disposition is necessary to comply with the attorney's duties;
- (e) to the extent reasonable, keep the adult's personal effects at the disposal of the adult.

(4) An attorney must keep the adult's property separate from his or her own property.

(5) Unless the enduring power of attorney states otherwise, subsection (4) does not apply to property that

- (a) is jointly owned by the adult and the attorney as joint tenants or otherwise, or
- (b) has been substituted for, or derived from, property described in paragraph (a).

Attorney's powers

20 (1) An attorney may make a gift or loan, or charitable gift, from the adult's property if the enduring power of attorney permits the attorney to do so or if

- (a) the adult will have sufficient property remaining to meet the personal care and health care needs of the adult and the adult's dependants, and to satisfy the adult's other legal obligations, if any,
- (b) the adult, when capable, made gifts or loans, or charitable gifts, of that nature, and
- (c) the total value of all gifts, loans and charitable gifts in a year is equal to or less than a prescribed value.

<p>(Regulation) Maximum value of gifts, loans and charitable gifts</p>

<p>For the purposes of section 20 (1) (c) of the Act, the total value of all gifts, loans and charitable gifts made by an attorney in a year must not be more than the lesser of:</p>

- | |
|---|
| <ul style="list-style-type: none">(a) 10% of the adult's taxable income for the previous year, and(b) \$5 000. |
|---|

(2) An attorney may receive a gift or loan under subsection (1) if the enduring power of attorney permits.

(3) Permissions under subsections (1) and (2)

- (a) must be express, and
- (b) may be in relation to a specific gift or loan, or charitable gift, or to gifts or loans, or charitable gifts, generally.

(4) An attorney may retain the services of a qualified person to assist the attorney in doing anything the adult has authorized the attorney to do.

- (5) An attorney may, in an instrument other than a will,
- (a) change a beneficiary designation made by the adult, if the court authorizes the change, or
 - (b) create a new beneficiary designation, if the designation is made in (i) an instrument that is renewing, replacing or converting a similar instrument made by the adult, while capable, and the newly designated beneficiary is the same beneficiary that was designated in the similar instrument, or (ii) a new instrument that is not renewing, replacing or converting a similar instrument made by the adult, while capable, and the newly designated beneficiary is the adult's estate.

(6) Subject to subsection (7), a person having custody or control of property belonging to an adult must deliver the property promptly, on request of the adult's attorney, to the attorney.

(7) A person must not deliver, to an adult's attorney, a will made by the adult if the adult has given instructions to a lawyer or notary public who holds the adult's will, or the will contains instructions, prohibiting delivery of the will to the attorney.

Attorney must not make a will for adult

21 An attorney must not make or change a will for the adult for whom the attorney is acting, and any will or change that is made for an adult by his or her attorney has no force or effect.

No delegation by attorney

23 (1) Unless the enduring power of attorney states otherwise, an attorney must not delegate any decision-making authority given to the attorney in an enduring power of attorney.

(2) Despite subsection (1), unless the enduring power of attorney states otherwise, an attorney may delegate all or part of the attorney's authority in relation to investment matters to a qualified investment specialist, including a mutual fund manager, if done in accordance with,

- (a) if the attorney is the Public Guardian and Trustee, the *Public Guardian and Trustee Act*, or
- (b) in any other case, section 15.5 of the *Trustee Act*.

Payment and expenses of attorney

24 (1) An attorney must not be compensated for acting as an adult's attorney unless the enduring power of attorney expressly authorizes the compensation and sets the amount or rate.

(2) An attorney may be reimbursed from an adult's property for reasonable expenses properly incurred in acting as the adult's attorney.

Disclosing information

33 An attorney must not disclose information or records obtained in the exercise of his or her authority except to the extent necessary to

- (a) perform his or her duties,
- (b) make a report to the Public Guardian and Trustee under section 34 (2) or comply with a requirement of the Public Guardian and Trustee, or
- (c) make an application to, or comply with an order of, the court.

Appendix B: Duties and Responsibilities of a Representative for Routine Financial Affairs under the *Representation Agreement Act* R.S.B.C. 1996, c. 405 and the *Representation Agreement Regulation* B.C. Reg. 199/2001

NOTE: these excerpts are limited to those provisions relevant for financial and legal affairs. Duties and responsibilities related to personal and health care decisions have been omitted.

Definitions

"routine management of financial affairs" includes payment of bills; receipt and deposit of pension and other income; purchases of food, accommodation and other services necessary for personal care, and the making of investments. For further details, see the full regulation at the end of this Reference Guide.

"health care" has the same meaning as in the *Health Care (Consent) and Care Facility (Admission) Act*,

"personal care" includes matters respecting:

- (a) the shelter, employment, diet and dress of an adult;
- (b) participation by an adult in social, educational, vocational and other activities;
- (c) contact or association by an adult with other persons, and
- (d) licences, permits, approvals or other authorizations of an adult to do something

"spouse" means a person who

- (a) is married to another person and is not living separate and apart, within the meaning of the *Divorce Act* (Canada), from the other person, or
- (b) is living with another person in a marriage-like relationship, including a marriage-like relationship between persons of the same gender.

Duties of representative

16 (1) A representative must

- (a) act honestly and in good faith,
- (b) exercise the care, diligence and skill of a reasonably prudent person, and
- (c) act within the authority given in the representation agreement.

(2) When helping the adult to make decisions or when making decisions on behalf of the adult, a representative must

- (a) consult, to the extent reasonable, with the adult to determine his or her current wishes, and
- (b) comply with those wishes if it is reasonable to do so.

...

(3) If subsection (2) applies but the adult's current wishes cannot be determined or it is not reasonable to comply with them, the representative must comply with any instructions or wishes the adult expressed while capable.

(4) If the adult's instructions or expressed wishes are not known, the representative must act

- (a) on the basis of the adult's known beliefs and values, or
- (b) in the adult's best interests, if his or her beliefs and values are not known.

(5) On application by a representative, the court may exempt the representative from the duty under subsection (3) to comply with any instructions or wishes the adult expressed while he or she was capable.

(6) Subject to subsection (6.1), a representative may not delegate any authority given to the representative in the representation agreement.

(6.1) A representative may delegate to a qualified investment specialist, including a mutual fund manager, all or part of the representative's authority with respect to investment matters.

(Regulation) Definitions

"**mutual fund manager**" has the same meaning as in the *Securities Act*,

"**qualified investment specialist**" means an individual who

- (a) is registered under the *Securities Act* to trade in or advise on securities or exchange contracts, and
- (b) is acting within the scope of the discretionary authority provided by his or her registration.

...

(8) A representative must

- (a) keep accounts and other records concerning the exercise of the representative's authority under the representation agreement, and
- (b) produce the accounts and other records for inspection and copying at the request of any or all of the following:
 - (i) the adult;
 - (ii) the adult's monitor;
 - (iii) the Public Guardian and Trustee.

(Regulation) Financial records of representatives

- (1) This section applies to a representative appointed under a representation agreement made under section 7 of the Act who has authority over an adult's financial affairs.
- (2) A representative must make a reasonable effort to determine the adult's property and liabilities as of the date on which the representative first exercises authority on the adult's behalf, and maintain a list of that property and those liabilities.
- (3) A representative must keep the following records in relation to the period for which the representative is acting:
 - (a) a current list of the adult's property and liabilities, including an estimate of their value if it is reasonable to do so;
 - (b) accounts and other records respecting the exercise of the representative's authority under the representation agreement;
 - (c) all invoices, bank statements and other records necessary to create full accounts respecting the receipt or disbursement, on behalf of the adult, of capital or income.

(9) A representative who is authorized to do anything referred to in section 7 (1) (b) must keep the adult's assets separate from the representative's assets.

(10) Unless the representation agreement provides otherwise, subsection (9) does not apply to assets that

- (a) are owned by the adult and the representative as joint tenants, or
- (b) have been substituted for, or derived from, assets that were owned by the adult and the representative as joint tenants.

(12) A person who, on the death of an adult, will be or might be a beneficiary of the adult's estate does not, for that reason, have a conflict of interest with the adult.

Power to retain services

17 An adult's representative may retain the services of a qualified person to assist the representative in doing anything the adult has authorized the representative to do.

Access to information

18 (1) A representative may request information and records respecting the adult for whom the representative is acting, if the information or records relate to

- (a) the incapability of the adult, or
- (b) an area of authority granted to the representative.

(2) A representative has the same right to information and records described under subsection (1) as does the adult for whom the representative is acting.

Representative must not make a will for adult

19.01 A representative must not make or change a will for the adult for whom the representative is acting, and any will or change that is made for an adult by his or her representative has no force or effect.

Disclosing information

22 A representative or a monitor must not disclose information or records obtained in the exercise of his or her authority except to the extent necessary

- (a) to perform his or her duties,
- (b) for the purposes of an investigation of the Public Guardian and Trustee under section 30 (3) (a) or 31, or
- (c) to make an application to, or comply with an order of, the court.

Payment and expenses

26 (1) A person named in a representation agreement as a representative, alternate representative or monitor is not entitled to be remunerated for acting as a representative or monitor except if

- (a) a provision of the representation agreement expressly authorizes and sets the amount or rate of the remuneration, and
- (c) the court, on application by the person named in the representation agreement as a representative, alternate representative or monitor, authorized that the remuneration be paid.

(2) A person is entitled to be reimbursed from an adult's assets for reasonable expenses properly incurred in performing the duties or exercising the powers of the adult's representative or monitor.

(Regulation) Routine management of adult's financial affairs

2 (1) For the purposes of section 7 (1) (b) of the Act, the following activities constitute "routine management of the adult's financial affairs":

- (a) paying the adult's bills;
- (b) receiving the adult's pension, income and other money;
- (c) depositing the adult's pension, income and other money in the adult's accounts;
- (d) opening accounts in the adult's name at financial institutions;
- (e) withdrawing money from, transferring money between or closing the adult's accounts;
- (f) receiving and confirming statements of account, passbooks or notices from a financial institution for the purpose of reconciling the adult's accounts;
- (g) signing, endorsing, stopping payment on, negotiating, cashing or otherwise dealing with cheques, bank drafts and other negotiable instruments on the adult's behalf;

- (h) renewing or refinancing, on the adult's behalf, with the same or another lender, a loan, including a mortgage, if
 - (i) the principal does not exceed the amount outstanding on the loan at the time of the renewal or refinancing, and
 - (ii) in the case of a mortgage, no new registration is made in the land title office respecting the renewal or refinancing;
- (i) making payment on the adult's behalf on a loan, including a mortgage, that
 - (i) exists at the time the representation agreement comes into effect, or
 - (ii) is a renewal or refinancing under paragraph (h) of a loan referred to in that paragraph;
- (i) taking steps under the *Land Tax Deferral Act* for deferral of property taxes on the adult's home;
- (j) taking steps to obtain benefits or entitlements for the adult, including financial benefits or entitlements;
- (k) purchasing, renewing or cancelling household, motor vehicle or other insurance on the adult's behalf, other than purchasing a new life insurance policy on the adult's life;
- (l) purchasing goods and services for the adult that are consistent with the adult's means and lifestyle;
- (m) obtaining accommodation for the adult other than by the purchase of real property;
- (n) selling any of the adult's personal or household effects, including a motor vehicle;
- (o) establishing an RRSP for the adult;
- (p) making contributions to the adult's RRSP and RPP;
- (q) converting the adult's RRSP to a RRIF or annuity and creating a beneficiary designation in respect of the RRIF or annuity that is consistent with the beneficiary designation made by the adult in respect of that RRSP;
- (r) making, in the manner provided in the *Trustee Act*, any investments that a trustee is authorized to make under that Act;
- (s) disposing of the adult's investments;
- (t) exercising any voting rights, share options or other rights or options relating to shares held by the adult;
- (u) making donations on the adult's behalf to registered charities, but only if
 - (i) this is consistent with the adult's financial means at the time of the donation and with the adult's past practices, and
 - (ii) the total amount donated in any year does not exceed 3% of the adult's taxable income for that year;
- (v) in relation to income tax,
 - (i) completing and submitting the adult's returns,
 - (ii) dealing, on the adult's behalf, with assessments, reassessments, additional assessments and all related matters, and
 - (iii) subject to the *Income Tax Act* and the *Income Tax Act (Canada)*, signing, on the adult's behalf, all documents, including consents, concerning anything referred to in subparagraphs (i) and (ii);
- (w) safekeeping the adult's documents and property;
- (x) leasing a safety deposit box for the adult, entering the adult's safety deposit box, removing its contents and surrendering the box;
- (y) redirecting the adult's mail;
- (z) doing anything that is
 - a. consequential or incidental to performing an activity described in paragraphs (a) to (aa), and
 - b. necessary or advisable to protect the interests and enforce the rights of the adult in relation to any matter arising out of the performance of that activity.

- 2) For greater certainty, the activities that under subsection (1) constitute "routine management of the adult's financial affairs" do not include any of the following:
- (a) using or renewing the adult's credit card or line of credit or obtaining a credit card or line of credit for the adult;
 - (b) subject to subsection (1) (h), instituting on the adult's behalf a new loan, including a mortgage;
 - (c) purchasing or disposing of real property on the adult's behalf;
 - (d) on the adult's behalf, guaranteeing a loan, posting security or indemnifying a third party;
 - (e) lending the adult's personal property or, subject to subsection (1) (v), disposing of it by gift;
 - (f) on the adult's behalf, revoking or amending a beneficiary designation or, subject to subsection (1) (r), creating a new beneficiary designation;
 - (g) acting, on the adult's behalf, as director or officer of a company.